United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

affidavit

75-6108

To be argued by
PATRICK H. BARTH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Bp/s

Docket No. 75-6108

EDWARD KAVAZANJIAN, FRANK BENEMIO, EDWARD BERTELE, FRANK COSTAS, JOSEPH D'AMICO, JOSEPH FARRELL, ALEX FLASTERSTEIN, MARTIN GREENFIELD, JOHN MARTIN, ARTHUR OPPOLIAN, PETE SCALCIONE, and, as a class, all investigators of the U.S. Immigration and Naturalization Service, Immigration and Naturalization Service Local No. 1917 (American Federation of Government Employees AFL-CIO), and National Council of Immigration and Naturalization Locals,

Plaintiffs-Appellants,

—v.—

U.S. IMMIGRATION AND NATURALIZATION SERVICE, THE U.S. CIVIL SERVICE COMMISSION, ROBERT E. HAMPTON, JAMES E. JOHNSON, L. J. ANDOLSEK, members of the U.S. CIVIL SERVICE COMMISSION, and THE UNITED STATES OF AMERICA,

Defendants-Appellees.

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

Preliminary Statement

The plaintiffs-appellants appeal from a Judgment, entered September 5, 1975, denying their claims for relief and dismissing their complaint. The case was tried to the Honorable Milton Pollack, United States District Judge for the Southern District of New York. The Dis-

trict Court's findings of facts and conclusions of law are contained in an Opinion dated August 18, 1975. The Opinion is reprinted in the Joint Appendix at A-58 to A-85 and is reported at 399 F. Supp. 339.

The eleven named plaintiffs-appellants are or were employed as investigators by the New York Region of the Immigration and Naturalization Service (hereinafter "INS") and are suing here individually and as representatives of a class of INS investigators. The essence of the complaint is the plaintiffs' claim that they investigated the most complex and delicate cases arising under the immigration laws, yet were not classified and compensated at the proper grade level. From this premise, the plaintiffs impute bad faith to the INS for the agency's failure to promote the plaintiffs to a higher grade level and categorize the Civil Service Commission's (hereinafter "CSC") decision that the plaintiffs were in the proper grade level as arbitrary, capricious and contrary to law. Plaintiffs seek an award of back pay and an order promoting them to a higher grade level.

The period of time in which the defendants-appellees allegedly acted unlawfully spans from 1959 to 1969. The plaintiffs claim that during that period of time INS deliberately withheld promotions from the plaintiffs. In July of 1966, a group of the plaintiffs exercised their right to have the CSC adjudicate the propriety of their grade level classification (A-221). Several investigators were promoted by the CSC (A-214, A-177) and more were promoted by INS (A-114-15, A-517-18, A-953). After two plaintiffs filed individual classification appeals in February and April of 1968 (A-377, A-389), another group of the plaintiffs filed an appeal with CSC in June of 1968 (A-335-39). All of these appeals to the CSC were unsuccessful.

At the trial of this action, the plaintiffs attacked the INS and CSC on several grounds. The claim was made that INS acted in bad faith by withholding promotions

from them and that INS cunningly dissuaded the investigators from appealing to CSC. It was further claimed that the INS removed higher grade level work from the plaintiffs for the purpose of hampering the plaintiffs' classification appeals to the CSC. The plaintiffs' attack against CSC focused on the claimed ineptness of the CSC to evaluate the unique position of an INS investigator and on the failure of the CSC to use the proper legal standard in adjudicating the appeals. Extensive documentary and testimonial evidence was presented to the District Court on these issues. The District Court evaluated the evidence and found each and every fact against the plaintiffs.

We contend that the classification of the plaintiffs' positions was properly determined by the agency charged with the responsibility and equipped with the expertise to evaluate this personnel dispute, the Civil Service Commission. Although INS and the CSC did not always agree with the plaintiffs' evaluation of their own work, and, indeed, although the agencies themselves were not always in agreement with respect to classification decisions, there simply was no bad faith or arbitrary and capricious action on the part of the defendants. Rather, as one of the plaintiffs testified, "[t]here can be a reasonable difference of opinion . . ." as to the proper grade level of an investigator's position (A-697). The District Court agreed. The Judgment of the District Court should be affirmed.

Issues Presented

1. Do federal employees have a substantive right to back pay in a case arising out of a classification dispute?

2. Did the District Court properly apply the arbitrary and capricious test to its review of an agency's classification decisions?

3. Did INS act arbitrarily or capriciously in administering its personnel program?

4. Did the CSC act arbitrarily or capriciously in its adjudication of the classification appeals?

5. Did the CSC apply an improper standard to its adjudication of the classification appeals?

Statement of Facts

A. Introduction:

The plaintiffs were employed by the New York Region of INS as General Investigators, GS-1810-11 (A-36). The position they sought was that of a General Investigator, GS-1810-12 (A-39). The differences between the two positions, as well as descriptions of typical assignments at the two levels (*Compare* A-462-63 *with* A-465-66), are set forth in the "Position Classification Standards for Investigator Positions in the Immigration and Naturalization Service, Department of Justice," GS-1810-0 General Investigating Series, which became effective in October of 1959 (A-459-72). The essential difference between the two positions is one of degree.

The GS-11 position classification standard reads, in part, as follows:

> "Assignments at this level usually involve multiple issues; have a potential for developing into a number of individual cases; consistently require unusual skill and ingenuity in uncovering and developing facts; and, because of the seriousness of t' e violations or actions involved, or the prominence of the individuals involved, are either (a) greater in their effect as deterrents to further violations, or (b) have a greater protective va'ue to the economy and security of the country, than

the investigative assignments at the next lower level." (A-462).

The GS-12 position classification standard reads, in part, as follows:

> "The characteristic assignments described at this level are relatively limited in volume in the Service.
>
> * * * * *
>
> "Assignments at this level are those of the most complex and delicate nature, where the issues involved have a grave impact on the national security, involve important political, social, or similar implications; or involve persons whose conviction would be of material benefit to the national economy, social welfare, or security . . ." (A-465).

The plaintiffs claim that their assignments fall into the "most complex and delicate" or GS-12 category.

B. INS implementation of the position classification standard (1959-1967)

From October of 1959 to February of 1967, when the CSC promoted some of the plaintiffs (A-214), the INS did not employ any nonsupervisory investigators at the GS-12 grade level (A-959). It was the judgment of INS that cases of GS-12 caliber were few in number (A-960) and that when these cases arose they were assigned to supervisory GS-12 investigators (A-227).

The plaintiffs claimed that they were investigating GS-12 cases and that INS deliberately and in bad faith refused to promote them. The bases of this claim were that supervisory GS-12 investigators "almost never went out into the field" and that when the plaintiffs allegedly complained of their grade level in 1963, INS ignored their

complaints and misled the plaintiffs to the extent of preventing them from filing classification appeals with the CSC (A-38). The District Court found that the plaintiffs' complaints of bad faith were unfounded.

1. The assignment and control of GS-12 investigations

The defendants do not dispute that supervisory GS-12 investigators rarely went out in the field to conduct investigations. Indeed, this fact is entirely consistent with the INS judgment that there were few cases of GS-12 caliber (A-960). This judgment was based on INS' internal classification studies and on outside reviews of the agency's classification program.

Mr. Benedict Ferro, presently an INS Deputy Director in Buffalo, testified on this subject (A-958-1014). Mr. Ferro started working for INS in April of 1963 (A-958) as a member of the Service's classification staff (A-984). Mr. Ferro testified that he had actual knowledge that prior to 1967, INS concluded that supervisors were performing the grade 12 investigative cases (A-979, A-984). INS issued periodic instructions which directed that the GS-12 cases be assigned to the supervisory investigators (A-978). Statistical studies and case reports of investigative work were regularly reviewed by INS' classification staff (A-960) and the investigators' positions were subject to supervisory review and certification in which the employees participated (A-961). None of these internal INS procedures indicated that the GS-11 investigators were performing at the GS-12 grade level (A-959-66, A-978-79).

In the period in question, the INS classification program was also reviewed by the Department of Justice in 1966 (A-509-12, A-965) and by the CSC in 1964 (A-

554-56, A-962).* Neither review was critical. With respect to the 1964 CSC nationwide review, the CSC submitted a report to INS in October of 1963 which focused on INS' New York District Office (A-488-91, A-965). The report stated that desk audits of twelve investigator positions "disclosed that supervisors generally have a good understanding of grade level distinctions and make work assignments consistent with the grade level of employees" (A-491). In addition, the New York Region of the CSC sent a different report to its headquarters (A-100-103). Portions of this internal CSC report were received by INS in 1966 (A-1011).**

The facts clearly demonstrate that INS acted properly and the District Court so concluded:

> "[T]his Court finds that the INS's original determination that the GS-12 work in its offices was minimal and that what there was of it was done by supervisors was not in bad faith and was neither arbitrary nor capricious, though, as subsequent events point out, it may have been erroneous." (A-77-78, 399 F. Supp. 346).

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* In 1968, the CSC again reported on INS' classification program (A-92-98). The 1968 CSC report criticizes INS stating in essence that it improperly classified its employees in lower grades thereby causing hundreds of employees to file classification appeals (A-92). The District Court focused on this criticism, stating: "[t]here is *nothing* that I have heard or seen in the record as at this date that justified that extravagant statement" (A-993) (emphasis added). Mr. Ferro testified that the criticisms were unwarranted. There weren't hundreds of appeals and, moreover, less than three percent of all classification appeals taken to the CSC were successful (A-993-96). In its findings of fact and conclusions of law, the District Court discounted the significance of the 1968 CSC nationwide review. *See* A-77 n.1, 399 F. Supp. 346 n.1. The 1968 report is simply irrelevant.

** The internal CSC report merely states that of the twelve investigators audited, a "small number" were assigned the most complex cases arising in the office (A-102).

2. The alleged early efforts of the plaintiffs to be upgraded

Plaintiff Edward Kavazanjian testified that he had requested INS to upgrade the plaintiffs to the GS-12 level and that INS did not act on these requests. These efforts consisted of visiting with an INS official in December of 1963 and inquiring about "what can we do to bring the grade up to parity with Customs and Narcotics level, GS-12 and GS-13" (A-572-73). The witness testified that he received a March 20, 1964 letter from INS advising him that the Service was awaiting the CSC report of its "recent study of classification throughout the Service" (A-99, A-573). In fact, the 1964 CSC nationwide survey was forwarded to the Department of Justice in October of 1964 (A-554). Mr. Kavazanjian then recounted that in 1964 he prepared a chart of all criminal investigators in the government comparing their various duties and responsibilities and sent the chart to INS. This homemade chart, the witness testified, established that INS GS-11 investigators "did more substantive work, more criminal and more complex, important criminal investigation than even an FBI agent." (A-577-78). The only documentary evidence indicating that such a chart was prepared is a July 13, 1966 letter from the plaintiffs' union to the CSC which had the chart as an enclosure. (A-223-43). The District Court considered these "early inquiries" of Mr. Kavazanjian and the plaintiffs' claim that INS did not act upon these inquiries in good faith and found the facts against the plaintiffs. The Court stated:

> "Plaintiffs' allegations of bad faith and evil motive on the part of the INS in responding to these early inquiries are simply not borne out by the credible evidence presented to this Court." (A-64, 399 F. Supp. at 342)

C. The plaintiffs appeal their classification to the CSC

There are four classification appeals to the CSC which are at issue here. One group of plaintiffs appealed to CSC in July of 1966. The plaintiff Peter Scalcione filed an individual classification appeal in February of 1968 and the plaintiff Joseph D'Amico filed an individual classification appeal in April of 1968. In June of 1968, another group of investigators filed classification appeals. The plaintiffs claim that the CSC did not properly adjudicate their appeals. These appeals will be discussed below in chronological order.

1. The 1966 appeals to the CSC

Fifty-four GS-11 general investigators filed an appeal with the New York Regional Office of the CSC in July of 1966 (A-214, A-221). Subsequently, four investigators withdrew their appeals and two were transferred from the New York area (A-214). The remaining appellants requested the CSC to audit their positions and to promote them to the GS-12 grade level. In February of 1967, the New York Region of CSC rendered its decision with respect to each appeal. Eleven investigators were certified to be classified at the GS-12 grade level (A-214). The named plaintiffs who appealed were all found to be properly classified at the GS-11 grade level. Of the thirty-six investigators who were found to be properly classified by the Regional Office, twenty-five of them, including the named plaintiffs, filed a request for reconsideration with the Bureau of Inspections of the CSC (A-40, A-604). After granting the request for reconsideration and, upon further review, an additional twelve investigators, including the plaintiff Kavazanjian, were certified to be classified at the GS-12 grade level on June 9, 1967 (A-177). The remaining thirteen investigators were found to be properly classified at the GS-11 level. Thus, twenty-three of the forty-eight investigators who appealed were

promoted to the GS-12 grade level.* In adjudicating these appeals, the CSC applied the majority time rule, namely, the investigators had to perform the higher grade level work for a majority of time before they became entitled to the higher grade (A-43, A-456-57).

The adjudication of the appeals at the New York regional office of the CSC

The CSC employee who was in charge of the New York Region's evaluation of the plaintiffs' appeal was Mr. Samuel Friedman, who had extensive experience in this area (A-932, A-823). In addition, the plaintiffs supplied Mr. Friedman with an extensive analysis of their arguments for reclassification (A-223-43).

After receiving the appeals, Mr. Friedman reviewed the Position Classification Standard for investigators (A-825) and determined that it was necessary to interview each of the investigators who appealed and to examine the nature of the cases that each was handling (A-826). These interviews or audits were commenced in July of 1966 (A-865) and were completed in December of 1966 (A-866). The New York Region sent out its decision letters certifying the upgrading of eleven investigators on February 1, 1967 (A-39). The 1966 appeal was the largest group appeal that the CSC had encountered in the New York Region (A-821).

Mr. Friedman testified that all of the investigators were audited and that the audits with few exceptions lasted more than an hour (A-867).** Several of the

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* In addition, INS upgraded an additional five or six investigators whose appeals were denied by the CSC. A-953; *see, e.g.*, A-114-15, A-517-18.

** Initially, plaintiffs complained that only two investigators were audited (A-39). Now, plaintiffs concede that they were all audited. Appellants' Brief at 20. The complaint now is that the audits were too brief. *Id.* at 21-22.

plaintiffs confirmed that the audits lasted that length of time or longer (Kavazanjian: two hours (A-587); Lazarus: "hours" (A-638); D'Amico: 45 minutes to one hour (A-721); Rowland: one hour (A-774); Ricciardi: two hours (A-814). In addition to reviewing the nature of the cases with the appealing investigators (A-825-826), the audits sought out the type of supervision received and the amount of time spent on various cases (A-829). The auditors also conferred with the investigators' supervisors (A-933). At the audits, case files were reviewed and the investigators were urged to fully explicate the nature and complexity of their work, with specific reference to the criteria in the classification standard (A-826, A-934). The trial testimony clearly demonstrates that the investigators were hardly reticent in advocating their cause.

The plaintiff Jack T. Lazarus, who was President of the union which represented the plaintiffs and who was one of the investigators who was not upgraded by the New York Region of the CSC, characterized Mr. Friedman's audit as "[a]bsolutely thorough and complete" (A-653). The District Court concurred. The Court found:

> "All of the appealing investigators were audited in 1966 . . . The audits were reasonably sufficient under all the facts and circumstances and done in good faith with a knowledgeable and perceptive understanding of the matters involved.
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> * * * * *
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> "These decisions bear no indication of disregard of the work evaluated or of the Position Classification Standard nor have they been credibly established to be deficient in fairness either in consideration or result" (A-65-67, 399 F. Supp. 342, 343).

The appeal to the Bureau of Inspections of the CSC

Soon after the February 1, 1967 decision finding that he was properly classified, Mr. Lazarus requested that the Bureau of Inspections of CSC review the New York Region's decision (A-659, A-203-204). By March of 1967, an additional twenty-four investigators had appealed to the Bureau of Inspections (A-604). The investigators who appealed to the Bureau of Inspections attempted to review their files which would have contained the notes of the CSC evaluators (A-860) at the New York CSC office. When they did so and what they found in the files was a matter of factual dispute.* Some of the plaintiffs stated that they saw Mr. Friedman's notes in their appeal files; others testified to the contrary.**

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* The work papers or notes that Mr. Friedman compiled during his interview of Messrs. Kavazanjian and Lazarus were produced and introduced into evidence at the trial of this action (A-438-50). These notes clearly corroborate the detailed fact finding engaged in by Mr. Friedman to which he testified. None of the other audit notes taken by Mr. Friedman were available. However, the notes taken by Mr. Van Tassel during his analysis of the classification appeals were placed into evidence (A-340-65). The plaintiffs focused their attack on the unavailability of all of Mr. Friedman's work papers which, as the record reflects, were completed more than three years before the plaintiffs ultimately commenced this action in July of 1969 (A-1).

** Mr. Lazarus wrote: "1. Reviewed 'my file' . . . at the office of the U.S.C.S.C. in Manhattan and was reassured when I saw Mr. Friedman's *report* on his on-cite audit of *ME*, on August 25, 1966" (A-189) (emphasis added). At the trial of this action, Mr. Lazarus testified to the contrary: "There was no report in that file" (A-658). The plaintiff Burke testified that he saw Mr. Friedman's audit notes in his appeal file (A-764). Other plaintiffs, such as Mr. Kavazanjian, testified that Mr. Friedman's notes weren't there when they attempted to review their appeal files (*see, e.g.*, A-598).

In conformity with established CSC practice, the plaintiffs' files were forwarded to the Bureau of Inspections upon its reopening of the case (A-862; *see* A-379). It was established at the trial that the plaintiffs attempted to review their files at the New York CSC office on May 5, 1967, some two months after the appeals had been pending at the Bureau of Inspections in Washington.* The District Court so concluded and stated:

> "The apparent reason for this phenomenon is that the important papers in the files were in transit, or located in Washington for consideration of the second level appeals before the time the appellants sought to view them in New York. Plaintiffs' attempt to ascribe bad faith or evil motive on the part of the CSC to these incidents has not been convincing. Nor does the credible evidence establish by a fair preponderance that evaluations were not made or were faulty or not consistent with the applicable standards" (A-67-68; 399 F. Supp. 343).

The CSC evaluator who was in charge of reviewing the appeals at the Bureau of Inspections was Mr. Charles Van Tassel (A-876). The plaintiffs contend that the Bureau of Inspections failed to correct the errors com-

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* Mr. Kavazanjian had testified that he attempted to review his file around March 1, 1967 (A-596). The District Court recognized that since Mr. Kavazanjian was testifying about an event which occurred nine years ago, his testimony could be mistaken (A-945). The date Mr. Kavazanjian attempted to review his file, however, was concretely established by documentary evidence. In a letter dated May 5, 1967 from Mr. Kavazanjian to the CSC, he states: "I have *today* examined the Appeal File which contained the information compiled by the CSC office here in New York . . ." (A-425) (emphasis added). Unfortunately, the reproducer of the Joint Appendix neglected to copy the date of this letter. The date is stated, however, to be May 5, 1967 in the index to the Joint Appendix (A-5). *See also* A-944-45.

mitted by Mr. Friedman and that Mr. Van Tassel improperly discussed the appeals with Mr. Friedman (Appellants' Brief at 27). Mr. Friedman testified on this subject. Mr. Friedman merely gave Mr. Van Tassel the benefit of his knowledge about the classification appeals (A-880). Mr. Friedman did not know what conclusion Mr. Van Tassel was going to reach and the decisions on the appeals to the Bureau of Inspections were solely those of the Bureau (A-878). The fact that on June 9, 1967 Mr. Van Tassel certified that twelve additional investigators should be classified at the GS-12 level (A-177) should be more than enough to refute any claim that his view of the appeals was somehow jaundiced by Mr. Friedman. The District Court so found:

> "There was testimony that Mr. Van Tassel conferred with Mr. Friedman as to the meaning of the latter's notes in some instances, action which this Court does not deem to have been improper, suspect or prejudicial, in the circumstances" (A-68, 399 F. Supp. 343).

2. The 1968 appeal of Mr. Peter Scalcione

The plaintiff Peter Scalcione filed an individual classification appeal on February 27, 1968 (A-377). Mr. Scalcione based his appeal on one case—the "R" case—that he was investigating. Prior to filing an appeal with the CSC, Mr. Scalcione requested the District Director of INS' New York office to review his classification (A-372-373). The District Director found that the "R" case had been developed prior to its assignment to Mr. Scalcione and that it would be a "borderline" GS-12 case even if only one investigator had "handled the entire matter in all of its ramifications" (A-373). Mr. Scalcione was audited by a CSC evaluator (A-786) whose judgment of the "R" case was the same as that reached by the District Director; in addition, the CSC evaluator also found that

none of the other cases assigned to Mr. Scalcione were of GS-12 caliber (A-369). Mr. Scalcione appealed the decision of the CSC's New York Region decision to the Bureau of Inspections (A-390) which denied his appeal (A-366).

The judgment of the District Director and the CSC was confirmed by Mr. Scalcione's testimony. He testified that the "R" case was developed by other investigators in Miami, transferred to New York and then assigned to him (A-782). This fact was brought to Mr. Scalcione's attention during his audit by the CSC evaluator (A-787). Furthermore, he testified that other investigators assisted him "in the major frauds aspect" of the case and in "checking—" (A-788-89).* The CSC decision on Mr. Scalcione's classification appeal was not, the District Court found, "... uninformed or arbitrary" (A-73, 399 F. Supp. 345).

3. The 1968 appeal of Mr. Joseph D'Amico

The plaintiff Joseph D'Amico was one of the unsuccessful investigators who intially appealed his classification to the CSC in July of 1966 (A-220). His appeal was denied by both the New York Region (A-383-86) and the Bureau of Inspections of the CSC (A-177). Thereafter, he requested that the INS' District Director recommend him for a promotion to GS-12; this request was likewise denied (A-387-88).

On April 9, 1968, Mr. D'Amico filed another appeal with the CSC stating that he was "now assigned a *number* of complex GS-12 level fraud investigations..." (A-389) (emphasis added). In his letter, Mr. D'Amico also stated that he was concerned that INS would remove the higher grade level work from him in order to defeat

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* At this point in Mr. Scalcione's testimony, his counsel changed the area of discussion.

his classification appeal. Subsequently, on May 16, 1968, Mr. D'Amico complained to the CSC that a GS-12 grade level case had been taken away from him on May 10, 1968 (A-380). In a letter of May 14, 1968, Mr. D'Amico outlined in detail the basis of his classification appeal, including an extensive discussion of the "S" case—the case which was reassigned to a GS-12 investigator (A-392-400). The CSC considered Mr. D'Amico's entire submission and concluded that he was properly graded at GS-11 (A-378-379). Mr. D'Amico appealed the New York Region decision to the Bureau of Inspections (A-390) which denied the appeal (A-366).

Mr. D'Amico's contentions are twofold. One, he claims that the CSC failed to consider the "S" case in adjudicating his appeal . Two, he claims that INS deliberately and in bad faith reassigned the "S" case to defeat his appeal. Neither contention is supported in the record.

Mr. Friedman testified that his practice in evaluating an appeal was to consider the cases that an appealing investigator had been assigned for a one-year period prior his evaluation (A-910). Mr. Friedman's testimony is buttressed by documentary evidence. In an October 10, 1967 letter from the CSC to INS, the CSC advised that it was upgrading a GS-11 investigator employed in the New York office based on a review of his work "*for the last year . . .*" (A-105) (emphasis added). *See also* A-333. In adjudicating his appeal, the CSC advised Mr. D'Amico that it considered his submission, which included Mr. D'Amico's opinion on the merit of the removed case. The only conclusion that can be reached is the one reached by the District Court:

> "[I]t has not been proven that the CSC did not consider the work that D'Amico, and others similarly situated, were doing at the time of appeal" (A-74, 399 F. Supp. 345).

Mr. D'Amico's contention that cases were taken from him for the purpose of defeating a classification appeals, likewise, has no support in the record. This is not to say that cases were not reassigned. Reassignments occurred because at the initial time of assignment it was difficult to determine the grade level or quality of a case. Mr. Kavazanjian, who was President of the employees union (A-569), testified that you "never know" what might develop into a complex case and that "[i]n five minutes a case [could become] a national conspiracy" (622-23).* Mr. Lazarus, who was also a President of the employees union (A-635), testified that it was "[a]bsolutely impossible" to distinguish a GS-11 from a GS-12 case at the time of initial assignment (A-650). The submissions made by the plaintiffs also affirmed the fact that it is impossible to tell exactly what grade level a case will be until the facts are developed. *See, e.g.*, A-225, A-267.

Mr. Publio Esperdy, the District Director of INS' District Office from 1959 to 1970, testified that a case was never taken away from a GS-11 investigator for the purpose of defeating his classification appeal (A-957). Under outstanding instructions, however, cases were reassigned "as soon as it was ascertained that the case was in the 12 category and should not have been with the 11 . . ." (A-957).**

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* It is interesting to note that Mr. Kavazanjian testified that the "five *or* ten complex cases . . ." he handled occupied "*between* 25 and 90 per cent of [his] time" (A-622) (emphasis added).

** One of the plaintiffs, Vincent Burke, who had supervisory responsibilities in 1968 refused to follow these instructions: "I thought if a Grade 11 investigator developed his case into a Grade 12, he should keep it" (A-770). Mr. Burke also testified to the effect that the GS-11 investigators concealed GS-12 cases from their supervisors so that they could create a basis for a classification appeal (A-767).

The District Court's findings with respect to reassignment of cases is as follows:

> "The removal, however, is consistent with management's duty to assign work which has become more difficult to investigators who are classified as GS-12. Absent any other evidence to support plaintiffs' contentions, the Court will not infer an improper motive from the mere fact of the reassignment" (A-74, 399 F. Supp. 345).

4. The 1968 group appeal to the CSC

On June 5, 1968, sixteen GS-11 general investigators appealed their classification to the CSC (A-335); subsequently, two appeals were withdrawn (A-259). The procedures used were much the same as in the 1966 group appeal. There were two differences. One, the investigators were requested to submit "[a] summary of each case on which you worked *during the last year* which represents, in your opinion, higher grade level investigative work" (A-333) (emphasis added). Two, the INS submitted evaluations of the investigators' cases. All of the appeals were denied (A-244).

The investigators who appealed were all members of the General Investigations Unit at the New York Office of INS. The grade level of their work was even a dispute between the plaintiffs. After their appeal was decided, Mr. Kavazanjian conceded that there were no GS-12 cases in the General Investigation Unit because "*all* the GS-12 work ha[d] been funneled . . ." into the Special Investigation and Frauds Units (A-528) (emphasis added). Mr. Kavazanjian, indeed, testified at trial that cases were regularly transferred from the General Investigations Unit when they developed a "criminal or fraudulent aspect . . ." (A-626). Nonetheless, the investigators have pursued their march through the CSC, the District Court, and now the Court of Appeals.

Although the plaintiffs claimed that the CSC did not audit them in 1968, the facts are to the contrary. Mr. Friedman testified that he did not have a clear recollection of the 1968 appeal (A-893); however, after reviewing the Regional Office's letters of decision (*See, e.g.*, A-245, A-248, A-251, A-254) which referred specifically to audits (A-899) and the Regional Office's log (A-935-36, A-551-52), Mr. Friedman testified:

> "[T]hose two pieces of information to me would be a pretty clear fact, to my mind, that I had made audits—that somebody made an audit." (A-893).

Mr. Friedman's testimony was corroborated by the plaintiffs. Mr. Kavzanjian specifically referred to a "CSC audit" with respect to the 1968 appeal by the investigators in the General Investigations Unit (A-528). The plaintiff Oppolian, the only one of the investigators who appealed in 1968 who testified, moreover, stated that he was audited by Mr. Friedman (A-735) and that several cases were discussed during the audit (A-737-38). Mr. Oppolian further testified that he knew that others were interviewed by Mr. Friedman (A-751). *See also* A-257.

In addition to the CSC's audits, the INS attempted to interview the appealing investigators but the men refused to talk to the INS' classification evaluators (A-259-60, A-735, A-973). Nonetheless, the INS classifiers reviewed 240 cases that were closed by the investigators during the three months preceding their appeal, discussed the investigator's case files and the level of the investigators work ". . . over the past year" with the investigators' supervisors (A-261). The results of the INS' evaluation were sent to the CSC in August of 1968 (A-259-65).

The CSC considered the information gathered by its own auditors, the INS' evaluation and the extensive writ-

ten submissions submitted by the investigators (*See, e.g.*, A-257-58 and A-305-332 (Costas); A-267-80 (Oppolian); A-281-90 (Martin); A-291-97 (Flasterstein)). Based on the CSC's expert evaluation of the facts, all of the 1968 appeals were denied. None of the investigators pursued their appeal to the Bureau of Inspections of the CSC as their colleagues had done in the past.

The District Court found that "audits [were] made in 1966 and 1968 in most cases. . . ." * With respect to the plaintiffs' complaint that the audit notes were unavailable for their review and that the administrative record was poorly organized, the District Court considered these issues and found that "[t]hese after-the-fact lapses in administrative efficiency, though inconvenient for the fact-finder, do not amount to arbitrariness in the processing of the actual appeals." (A-79 n. 2, 399 F. Supp. 346 n. 2).

Each and every objection raised by the plaintiffs was considered by the District Court. The Court concluded:

> "The CSC has latitude as to the manner in which it will perform its statutory function, and this Court finds that it did not act arbitrarily or capriciously or in abuse of its discretion in processing the appeals involved herein." (A-78-79, 399 F. Supp. 346).

D. INS responds to the CSC decisions

The New York Region of the CSC advised INS that eleven of the investigations who appealed in 1966 were to be upgraded on the same date the investigators were notified of the decisions, February 1, 1967 (A-210, A-

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* The CSC's decision letter to plaintiff Norman Henry did not state that the CSC conducted an audit of his position (A-537-38).

214-15, A-1014). Immediately after receiving the decisions, INS undertook a nationwide survey of the Service to determine the extent of GS-12 grade level work. As Mr. Ferro testified, INS used the same criteria as CSC did in evaluating cases—"[h]owever, we didn't always come up with the same decision." (A-969, A-1009).

As a result of this survey, INS determined that an additional forty-five GS-12 positions were required to handle the identified GS-12 work (A-969). It was also determined that if the Service's need for GS-12 investigators was not fully met by reclassifying those found to have more than a 50 per cent GS-12 caseload, the investigators with the next highest percentage of GS-12 grade level work would be reclassified to the GS-12 level and the GS-12 grade level work would be consolidated in these new positions (A-970-72, A-1007). The latter group of investigators were not reclassified pursuant to INS' competitive nationwide promotion system (A-975) because of the disruptive effect that transferring investigators from one area of the country to another would have had on INS (A-975). This fact was fully recognized by the CSC and was communicated to the plaintiffs (A-971, A-174-175, Defendants' Exhibit E, at 1-2).

The District Court found that the use of INS' "normal method of filling new positions" would have been disruptive of the Service's affairs; that INS had the approval of the CSC in effectuating the promotions of those investigators who had been doing the greatest percentage of GS-12 work; that "[a]fter the promotions, the higher grade work in the office was to be channelled to these investigators so that the *majority of their time* would be spent on such work", and that the 1967 promotions were reasonable and not arbitrary or capricious (A-69-70, 399 F. Supp. 344) (emphasis added).

The plaintiffs contended that the results of the 1967 INS nationwide survey were different than the results of the 1966 CSC audits. In support of this proposition, the plaintiffs advanced a preliminary worksheet prepared by the INS evaluators (A-170, A-1004). As Mr. Ferro testified, the final conclusions of the 1967 survey differed in many respects from the worksheet (A-1004). The Court found that the "applicable standards are not, and probably could not be, so precise that two honest human beings could not disagree in evaluating any given task" (A-69, 399 F. Supp. 344). The testimony presented by the plaintiffs confirmed the Court's finding (*see, e.g.*, A-697). The Court further noted that the 1966 CSC audit and 1967 INS survey were not contemporaneous, and, therefore, were not comparable (A-71, 399 F. Supp. 344). Judge Pollack concluded: "The Court finds no arbitrariness proven in the circumstances of which plaintiffs complain." (A-72, 399 F. Supp. 344).

During the INS evaluation of the 1968 group appeal, the Service concluded that although none of the investigators were performing Grade GS-12 for a majority of time, there was sufficient grade 12 level work in the General Investigations Unit to warrant the establishment of three GS-12 positions to which the existing grade 12 level work would be funnelled (A-260, A-525-26). The INS requested CSC's advice as to whether these positions should be awarded to the investigators who had the highest percentage of GS-12 work, as had been done in 1967 nationwide survey promotions, or whether the Service's nationwide merit promotion plan should be applied (A-531-32). The CSC advised that the latter was applicable (A-533). In addressing itself to this issue, the District Court found that the "potential for disruption that was present in the nationwide creation of new positions in 1967 was not a factor in the creation of three new positions in the New York office in 1968" (A-76, 399 F. Supp. 345-46), and that the plaintiffs' claim that INS and the CSC

were conspiring to deprive them of a higher grade was not correct. *Id.*

E. The substantial—majority time dispute

The plaintiffs advocate that the majority time standard applied in the adjudication of their appeals was the wrong standard. The evaluation standard they advocate is the substantial time exception to the majority time rule. The exception to the rule provides that in certain very limited circumstances an employee would be entitled to be upgraded if he spent a substantial amount of his time on higher grade level work. *See Position-Classification Standards for Positions Subject to the Classification Act of 1949, as Amended* (A-454-57).

There is no evidence in the record which indicates that the substantial time exception was ever applied to the evaluation of GS-12 work done by INS investigators either in New York or anywhere else. The two threads upon which plaintiffs base their factual statement that the substantial time exception was used in adjudicating classification appeals are a document (A-89-91) and the testimony of Mr. Friedman characterizing the INS 1967 nationwide survey promotions (A-928-30). The document, a CSC letter to the Department of Justice, merely states that in El Paso, Texas, the substantial time exception was applied to a decision relating to the classification of GS-11 INS investigators. Mr. Friedman simply mischaracterized INS actions in 1967. The 1967 survey was not a classification dispute and all of the men reclassified as a result of the survey were, as the District Court found, to spend "the majority of their time" on the GS-12 work (A-70, 399 F. Supp. 346).

The plaintiffs also claim that Mr. Friedman advised the investigators who appealed in 1966 that the substantial time exception would be applied to their appeals. The

Appellants note in their brief that this contention is supported by:

> "the definite recollection of two *Government* witnesses and a contemporaneous document." Appellants' Brief at 20 (emphasis added).

The two "Government" witnesses are none other than union presidents Kavazanjian and Lazarus, two of the plaintiffs in this action. The "contemporaneous document", authored by Mr. Kavazanjian, should be compared to another one of his contemporaneous documents which sets forth the majority time rule as well as the substantial time exception in full detail (A-425-29). Moreover, regardless of what Mr. Friedman advised the plaintiffs, the facts would have remained the same. As the District Court noted:

> "It seems to me that the evidence cannot be said to change dependent upon the rule to be applied . . . (A-590).

Mr. Friedman testified that to his knowledge the substantial time exception was not applied to the New York Region and/or the West Coast in 1966 (A-850-851) and that INS used the majority time rule in its "in-house classification" (A-850). He also advised the plaintiffs of the majority time rule and the substantial time exception to the rule and the circumstances under which the exception would prevail (A-852). He further testified that the substantial time exception was rarely applicable (A-932-33), and that in his judgment the majority rule was appropriately applied in the New York investigator appeals (A-922-24). This judgment was approved by the Civil Service Commission (*see, e.g.*, A-89-91, A-150, A-174-75, Defendants' Exhibit E, at 1-2). The application of the majority time rule by the CSC is fully supported by both logic and the evidence and the District Court so found:

"This Court finds on the evidence presented to it that the use of the majority of time rule in adjudicating classification appeals in the New York INS office is not arbitrary, capricious, nor an abuse of discretion on the part of INS or the CSC." (A-84, 399 F. Supp. at 348).

ARGUMENT

POINT I

The plaintiffs are not entitled to the relief of back pay which they seek and this appeal should be dismissed as moot.

The plaintiffs seek back pay for that period of time in which they claim they were improperly classified at the GS-11 level. The District Court, relying on *Brown* v. *General Services Administration*, 507 F.2d 1300 (2d Cir. 1974), *cert. granted*, 421 U.S. 987 (1975), held that the United States has not consented to be sued for back pay and, consequently, the doctrine of sovereign immunity barred the granting of the relief sought regardless of the merits of the claim (A-80 n.4, 399 F. Supp. 347 n.4).

In their brief, plaintiffs call the Court's attention to various cases and administrative decisions which have allowed awards of back pay in certain limited factual situations and statutory contexts which are not relevant to the case at bar. All of plaintiff's precedents, as they pertain here, have recently been laid to rest by the Supreme Court in *United States* v. *Testan*, — U.S. —, 44 U.S.L.W. 4245 (Mar. 2, 1976).

In *Testan*, the Supreme Court addressed itself to the specific issue presented here, *viz.*, does a federal employee have a substantive right to back pay for the period of

a claimed wrongful classification. The Supreme Court answered the question in the negative and held that neither the Classification Act, 5 U.S.C. § 5101 *et seq.*, nor the Back Pay Act, 5 U.S.C. § 5596, constituted a waiver of sovereign immunity in the context of a classification dispute. 44 U.S.L.W. at 4249-50. The Supreme Court stated:

> ". . . Congress has not made available to a party wrongfully classified the remedy of money damages through retroactive classification." 44 U.S.L.W. at 4249.
>
> * * * * *
>
> "[T]he federal employee is entitled to receive only the salary of the position to which he was appointed, even though he may have performed the duties of another position or claims that he should have been placed in a higher grade." 44 U.S.L.W. at 4250.

Testan controls and, thus, the plaintiffs are not entitled to back pay.

It is to be noted that each plaintiff who testified either is employed or has retired at the sought after grade level or higher (A-604, A-646, A-671, A-695, A-698, A-722, A-747, A-760, A-771, A-781, A-791, A-798 and A-811). Given *Testan* and the plaintiffs' promotions to the desired grade level, the plaintiffs can have no further dispute with the defendants and, therefore, this appeal is moot. *See Marrone* v. *U.S. Immigration & Naturalization Service*, 500 F.2d 418, 420 n.1 (2d Cir. 1974) (*per curiam*).

POINT II

The arbitrary and capricious test is applicable to a review of the decisions of the Civil Service Commission on classification disputes and to a review of the personnel practices of the Immigration and Naturalization Service.

The District Court reviewed the actions of the CSC and INS pursuant to 5 U.S.C. § 706(2)(A) which imposed upon the plaintiffs the burden of showing that the complained of actions were arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law (A-60, 399 F. Supp. 341).*

One of the several cases which the District Court cited as authority for applying 5 U.S.C. § 706(2)(A) was the recent Supreme Court case of *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). *See* A-60-61, A-84-85, 399 F. Supp. 341, 348. In *Overton Park*, the Supreme Court held:

> "Review under the substantial-evidence test is authorized *only* when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself, . . . or when the agency action is based on a public adjudicatory hearing." 401 U.S. at 414 (Emphasis added.)

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* The very same scope of review was advocated by the plaintiffs in the District Court. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants Motion for Summary Judgment and in Support of Plaintiffs Cross-Motion for Summary Judgment at 19; Plaintiffs' Trial Memorandum at 14. Having invited the claimed error made by Judge Pollack, the plaintiffs should be precluded from advocating that the trial court was incorrect. *See Director General* v. *S.S. Maru*, 459 F.2d 1370, 1377 (2d Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973); *Remington Rand, Inc.* v. *United States*, 202 F.2d 276, 278 (2d Cir. 1953); *Gardner* v. *Darling Stores Corp.*, 138 F. Supp. 160, 161 (S.D.N.Y. 1956), *aff'd*, 242 F.2d 3 (2d Cir. 1957).

The agency action complained of here is the failure of the INS to comply with 5 U.S.C. § 5107 as supposedly demonstrated by its alleged failure to *sua sponte* upgrade the plaintiffs and the failure of the CSC to properly adjudicate the plaintiffs classification appeals pursuant to 5 U.S.C. § 5112. Neither Section 5107 nor Section 5112 relate to rulemaking and neither section even contemplates a public adjudicatory hearing. All of the cases relied upon by the plaintiffs for the use of the substantial evidence test either relate to rulemaking or agency decisions based on evidentiary hearings. *Marrone* focused on CSC rulemaking practices and, indeed, did not even set out the standard of review that would be applicable. *See Marrone* v. *U.S. Immigration & Naturalization Service, supra*, 500 F.2d at 420. The *McCourt* and *Halsey* cases involved complaints that the Veterans Preference Act, 5 U.S.C. § 2108 *passim*, was violated, and in each case an evidentiary hearing was held. *See McCourt* v. *Hampton*, 514 F.2d 1365, 1369 (4th Cir. 1975); *Halsey* v. *Nitze*, 390 F.2d 142, 144 (4th Cir.), *cert. denied*, 392 U.S. 939 (1968). The *Charlton, Vigil* and *McEachern* cases all involved employee dismissals and in each case an evidentiary hearing was held. *See Charlton* v. *United States*, 412 F.2d 390, 393 n.5 (3d Cir. 1969); *Vigil* v. *Post Office Department*, 406 F.2d 921, 923 (10th Cir. 1969); *McEachern* v. *United States*, 321 F.2d 31, 33 (4th Cir. 1963). The *Zucker* case does not discuss any standard of review. *See Zucker* v. *Baer*, 262 F. Supp. 528 (S.D.N.Y. 1967). None of these authorities are relevant to the case at bar.

Not only have the plaintiffs cited inapposite cases, they have also ignored the precedents established by this Court for the review of personnel management decisions.

In *United States* v. *Professional Air Traffic Controllers Organization* (*PATCO*), 438 F.2d 79, 80-81 (2d Cir. 1970), *cert. denied*, 402 U.S. 915 (1971), and in *McTiernan* v. *Gronouski*, 337 F.2d 31, 34 (2d Cir. 1964), this Court held that judicial review in federal personnel cases was limited to a determination as to whether there has been substantial compliance with the statutory and regulatory requirements and to a determination as to whether the Government has acted in an arbitrary manner.*

The standard of review applied by the District Court was in conformity with 5 U.S.C. § 706(2)(A), *Overton Park*, *PATCO* and *McTiernan*. *See Reece* v. *United States*, 455 F.2d 240, 242 (9th Cir. 1972); *Almeda* v. *United States*, 453 F.2d 1397, 1400 (Ct. Cl. 1972); *Mendelson* v. *Macy*, 356 F.2d 796, 800 (D.C. Cir. 1966); *Schlachter* v. *U.S. Civil Service Commission*, 71 Civ. 1976 (CLB) (S.D.N.Y., July 2, 1975) (unreported) (Memorandum Decision and Order, at 7-8); *Brech* v. *United States Immigration & Naturalization Service*, 362 F. Supp. 914, 917 (S.D.N.Y. 1973).

We submit that what the plaintiffs sought in the District Court and seek now in this Court is a *de novo* review of the agencies' actions. By doing so they necessarily ask this Court to ignore the expertise of the agencies in personnel matters. As this Court cautioned in *Air Line Pilots Association* v. *Quesada*, 276 F.2d 892, 898 (2d Cir. 1960):

> "It is not the business of courts to substitute their untutored judgment for the expert knowledge of those who are given authority to implement the general directives of Congress."

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* Both *PATCO* and *McTiernan* involved disciplinary action taken against federal employees. The alleged deprivation of rights in the case at bar does not rise to that level. *See Gnotta* v. *United States*, 415 F.2d 1271, 1276 (8th Cir. 1969) (Blackmun, J.), *cert. denied*, 397 U.S. 934 (1970).

Accord, Citizens to Preserve Overton Park, Inc. v. *Volpe*, *supra*, 401 U.S. at 416.

The District Court which analyzed the documentary evidence and heard the testimony of sixteen witnesses applied the appropriate standard of review.*

POINT III

The INS properly implemented the position classification standard between 1959 and 1967.

Initially, the plaintiffs claimed that "[b]etween 1963 and 1969 . . ." (A-38) the INS did not implement the position classification standard, cunningly dissuaded the investigators from appealing to the CSC and removed higher grade level work from the plaintiffs for the purpose of defeating their classification appeals. On this appeal, the plaintiffs have chosen the time period between 1959 and 1967 as the one in which INS allegedly acted improperly. The threshold question is whether the conduct of INS for the period in question is reviewable. We submit it is not. In any event, it is clear that INS did not act improperly.

A. The actions complained of are not reviewable

The INS was obligated to "place each position under its jurisdiction in its appropriate class and grade . . ." 5 U.S.C. § 5107. The consequences of failure to comply with Section 5107 are the sanctions imposed by 5 U.S.C.

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* In any event, it is clear, as set forth in the Statement of Facts, *supra*, that the decisions here would have withstood scrutiny under the substantial evidence test.

§ 5111 which basically provides that the CSC may take away the agency's classification authority. No other remedy can be fairly implied from 5 U.S.C. § 5107.

The plaintiffs cite *Brech* v. *United States Immigration & Naturalization Service*, *supra*, as authority for this Court's ability to review the alleged "nonactions" of the CSC. *See* Appellants' Brief at 11. Their reliance is misplaced. The language quoted from *Brech* by the plaintiffs is correctly quoted but misleading. The plaintiffs chose to delete a footnote to the quote. The footnote specifies that the remedy Congress provided for an employing agency's dilatory conduct is the authority of "the CSC . . . to revoke an agency's power to classify positions if the agency is not acting in conformance with published standards." 362 F. Supp. at 919 n.3. *See United States* v. *Testan*, *supra*, 44 U.S.L.W. at 4249.

The remedy which Congress has granted to employees who claim they are aggrieved by agency action is the "administrative avenue of prospective relief available to them under the elaborate and structured provisions of the Classification Act, 5 U.S.C. §§ 5101-5115 . . . [which] may be brought into play at the request of an employee. 5 U.S.C. § 5112(b)." *United States* v. *Testan*, *supra*, 44 U.S.L.W. at 4249. *See Marrone* v. *U.S. Immigration & Naturalization Service*, *supra*, 500 F.2d at 420. None of the plaintiffs *chose* to avail themselves of the remedy of appealing their classification to the CSC until July of 1966. They cannot now be heard to complain that prior to that date and prior to their exhaustion of the available administrative remedies that the INS acted improperly. As the District Court held: "Plaintiffs correctly identified their administrative remedy when they filed classification appeals with the CSC." A-78, 399 F. Supp. 346. The complained of INS conduct is not reviewable.

B. INS did not act improperly

The evidence adduced at trial demonstrated that at best the plaintiff Kavazanjian only made a few general inquiries with respect to classification matters in the period between December 1963 and the filing of the 1966 appeals in July (A-572-73). Mr. Kavazanjian's claim that INS cunningly led him astray by giving him incorrect information is incredible. The record amply demonstrates that both Mr. Kavazanjian and his fellow investigators were hardly ready to be led astray. The "supposed" fact which plaintiffs claim demonstrates the guile of INS is a 1963 CSC internal report from the CSC's New York office to its office in Boston, which, in itself, is innocuous (A-100-103).

This report, dated October 31, 1963, which is referred to by the plaintiffs as the "Googe Report" (Appellants' Brief at 14) was obtained by Mr. Kavazanjian at a clandestine meeting with an unidentified CSC employee in 1965 (A-578-79). Mr. Kavazanjian's contacts were better than those of the INS. The Service did not receive the "Googe Report" until 1966 (A-1011). The plaintiffs ignore this uncontradicted fact and again make the baseless claim that INS received this internal CSC report in 1963 and that an INS official, therefore, mislead them in March of 1964 when he stated that INS was still awaiting a CSC report (A-99). The report that INS was awaiting was the CSC's report on "classification throughout the Service . . ." (A-99). In fact, the CSC's nationwide report was not transmitted to the Department of Justice—INS' parent agency—until October of 1964 (A-554).

Contrary to plaintiffs' claims, the evidence demonstrates that prior to 1967 INS concluded that GS-12 work was being done by the supervisors and not the plaintiffs. This belief was not, as plaintiffs contend,

"benign ignorance", but was based on policy directives (A-978), statistical studies and case reviews (A-960), supervisory reviews and certification (A-961, A-978), and on reports from the Department of Justice (A-509-12) and the CSC (A-554, A-488-91), all of which confirmed INS' view that work was properly assigned and that its classification program was operating satisfactorily.* Indeed, a mere three per cent of the appeals made to the CSC by INS employees were successful (A-996). The plaintiffs' argument tha tthe subsequent upgradings by the CSC and reclassification by INS demonstrate bad faith on INS' part has no more merit than an argument that a reversal of one of this Court's opinions demonstrated bad faith in this Court's adjudication of an appeal. The CSC simply interpreted the applicable standard differently than INS initially did.

Nor did INS take cases away from the plaintiffs for the purpose of defeating their classification appeals. In conformity with sound management practices, cases were reassigned when it was ascertained that a case was in the GS-12 category and, therefore should not be assigned to a GS-11 investigator (A-957).**

The District Court's finding that INS did not act in bad faith and was not arbitrary or capricious is supported by the record and is not clearly erroneous.

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* The 1968 CSC nationwide survey relied upon extensively by the plaintiffs is simply irrelevant. *See* Statement of Facts, *supra*, at 7.

** In addition, this practice helps to prevent employees from "assuming unto themselves responsibilities they had no right to assume in an effort to upgrade their classifications." *Zucker* v. *Baer*, 262 F. Supp. 528, 530 (S.D.N.Y. 1967) (Mansfield, J.).

POINT IV

The Civil Service Commission properly adjudicated the classification appeals.

Pursuant to 5 U.S.C. § 5112(b), the CSC is charged with the responsibility of adjudicating classification disputes upon the request of a federal employee. The agency has promulgated regulations which set out the procedures that will be followed in processing a classification appeal. *See* 5 C.F.R. §§ 511.601-.612. It is clear that the Commission properly complied with its statutory responsibility and its own regulations and that its decisions were not arbitrary or capricious.

The agency exercised its discretion and determined that it would utilize audits to ascertain the facts necessary to its resolution of the appeals. *See* 5 C.F.R. § 511.607. With two exceptions,* it is clear that all of the investigators who appealed were audited. Extensive testimony by Mr. Friedman revealed the detailed fact finding that the auditors undertook. The decisions were reached after the auditors gathered and evaluated the evidence with respect to the applicable standard. In reaching a decision, the CSC considered the work that the investigators performed in the one-year period prior to their respective appeals. *See Statement of Facts, supra,* at 9-20. The District Court found that these decisions were arrived at in accordance with law and were not arbitrary or capricious. That conclusion is not clearly erroneous.

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* The plaintiff D'Amico was audited in 1966 but not in 1968 when he filed his individual appeal (A-378). He did, however, submit an extensive written argument in support of the 1968 appeal to the CSC. *See* A-392-400. In addition, Mr. Henry, who appealed with the 1968 group of investigators, was not audited. *See* A-387.

In addressing this issue in Point II of their brief, the plaintiffs are presenting to this Court the very same factual contentions and arguments which were advanced in the District Court. We submit that the issues cannot be relitigated anew in the Court of Appeals and we will not attempt to do so. The issues of the adequacy of the District Court's findings of fact, administrative due process, and the defendants' good faith, however, will be discussed below.

A. The District Court found all the facts against the plaintiffs

The plaintiffs complain that the District Court failed to set forth adequate findings of fact with respect to the audits and the auditors' work papers or notes. This argument misses the point. The plaintiffs are seeking review of CSC decisions and not review of the Commission's employees' work papers. Moreover, the Court did find that audits were "made in 1966 and in 1968 in most cases . . . ." A-79 n.2, 399 F. Supp. 346 n.2. With respect to the auditors' work papers, the District Court found that the "apparent reason . . ." for the notes not being available for the plaintiffs review was that the notes were forwarded to Washington upon the filing of the plaintiffs administrative appeal. This finding is supported by the record and the use of the word "apparent", meaning obvious, does not detract from the finding. *See Movible Offshore, Inc.* v. *M/V Wilken A. Falgout*, 471 F.2d 268, 272 (5th Cir. 1973). Moreover, the District Court described the lack of audit notes and the organization of the administrative record for what they were: "[A]fter-the-fact lapses in administrative efficiency . . ." which "do not amount to arbitrariness in the processing of the actual appeals." A-79 n.2, 399 F. Supp. 346 n.2. The District Court's findings are complete.

B. The plaintiffs were given administrative due process

The plaintiffs complain that they were denied administrative due process because during the Bureau of Inspectors' consideration of their appeal from the New York Region's decision, Mr. Friedman and Mr. Van Tassel talked to each other. Mr. Friedman testified that Mr. Van Tassel reached his decision on his own. Indeed, Mr. Van Tassel upgraded twelve investigators whom Mr. Friedman judged were not entitled to upgradings. Under the "circumstances" the Court found that this was not "improper, suspect or prejudicial . . . " A-68, 399 F. Supp. 343. That conclusion is not clearly erroneous.*

C. The District Court did not assume that either INS and/or the CSC were acting in good faith

Although both INS and the CSC were entitled to a presumption of good faith, *see, e.g., Drucker* v. *United States*, 498 F.2d 1350, 1352-53 (Ct. Cl. 1974); *National Nutritional Foods Association* v. *FDA*, 491 F.2d 1141, 1145 (2d Cir. 1974), the District Court did not invoke that presumption. Rather, the Court took extensive testimony on this subject and simply found that plaintiffs failed to demonstrate that either agency acted in bad faith.

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* *Brown* v. *United States*, 377 F. Supp. 530 (N.D. Tex. 1974), is inapposite. In *Brown*, an employee was discharged after an evidentiary hearing. The prosecuting attorney discussed the case ex parte with the Trial Examiner adjudicating the case. The case at bar does not involve a judicial or quasi-judicial hearing.

POINT V

The Civil Service Commission correctly applied the majority time rule to its adjudication of the plaintiffs' appeals.

The Position-Classifications Standards which were applied here have been in effect since 1952 (A-455). The standard states the rule that an employee must spend a majority of his "working time" on higher grade level work before he is entitled to a higher grade level (A-457). Given the multitude of federal jobs and the diverse conditions which prevail at different work sites throughout the Nation, it is obvious that some flexibility must be provided for in the classification of positions. The substantial time exception provides that flexibility and allows, in very limited instances, a higher grade level for those federal employees who spend less than a majority of time on higher grade level work. Before the exception is applied, however, the CSC must determine that the higher grade level work is "paramount in influence or weight . . ." and is "a regular or recurring part of the job . . ." (A-457).

Mr. Friedman testified as to the use of the exception.* It could be used, for example, in a small office with one employee who had to do all the work that was in the office, regardless of its grade level. In this instance, the higher grade level work would be paramount in interest because it had to be done by the only employee available (A-837-38); therefore, the employee would be classified by application of the exception.

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* The exception was never applied to INS employees working in New York. Indeed, the only evidence that it was ever applied to INS employees was its application to GS-11 investigators in El Paso, Texas. *See Statement of Facts, supra,* at 23-24.

The situation in New York was quite different. It was not a one-employee office. There were hundreds of employees and numerous supervisors who exercised control over the assigned work. Grade level 12 work was assigned to GS-12 investigators and there were a sufficient number of GS-12 investigators to handle the higher grade level work. The exception could not have been rationally applied to the plaintiffs' classification appeals.*

Mr. Friedman and the CSC determined that use of the exception was not warranted here (A-922-24, A-89-91, A-174-75; Defendants' Exhibit E, at 1-2). The District Court held that this decision made sense and was not arbitrary, capricious or an abuse of discretion. A-84, 399 F. Supp. 348.** The District Court's findings are not clearly erroneous.

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* The exception is not inconsistent with the "equal pay for equal work" principle expressed in the "purpose" section of the Classification Act. *See* 5 U.S.C. § 5101(1)(A); *United States* v. *Testan, supra,* 44 U.S.L.W. at 4248. Where the exception was applied, the employee had full responsibility, and all the concomitant qualifications, to fully perform the higher grade level work. In situations such as New York, cases were reassigned when they developed higher grade level characteristics, and, at all times, the GS-11 investigators completed their tasks under supervision. *See* A-80-84, 399 F. Supp. 347-48.

** The position classification standards which include the substantial time exception have been in effect since 1952. When the plaintiffs' colleagues made a similar argument in the Ninth Circuit, their claims were rejected. *White* v. *United States Civil Service Commission,* 468 F.2d 1357, 1358 (9th Cir. 1972) *(per curiam)*. Likewise, in the case at bar, the CSC's consistent interpretation of the Classification Act is entitled to conclusive weight. *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965).

CONCLUSION

For the foregoing reasons, the Judgment of the District Court should be affirmed.

Dated: New York, New York
March 11, 1976

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 2

11th day of March, 1976 she served ~~a~~ copys of the within Appellee's Brief

by placing the same in a properly postpaid franked envelope addressed:

John A. Steel
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And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

11th day of March, 1976

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572560
Qualified in Bronx County
Commission Expires March 30, 1977